85-1148

No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1985

ROBERT CARROLL MORRIS, IV,
Petitioner,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY
FOR THE DISTRICT OF COLUMBIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

I

WAS PETITIONER DENIED DUE PROCESS BY THE REFUSAL OF THE DISTRICT OF COLUMBIA BOARD ON PROFESSIONAL RESPONSIBILITY AND DISTRICT OF COLUMBIA COURT OF APPEALS TO AFFORD PETITIONER AN EVIDENTIARY HEARING TO SHOW CAUSE WHY HE SHOULD NOT BE RECIPROCALLY DISBARRED IN THE DISTRICT OF COLUMBIA?

II

IS RULE XI SECTION 18(5) OF THE RULES GOVERNING THE BAR OF THE DISTRICT OF COLUMBIA UNCONSTITUTIONAL WHEN IT REQUIRES THE ATTORNEY TO SHOW CAUSE WHY HE SHOULD NOT BE RECIPROCALLY DISBARRED BUT DOES NOT PROVIDE FOR A MANDATORY EVIDENTIARY HEARING IN WHICH TO MAKE SUCH A SHOWING?

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 5

I. Petitioner was denied due process by the denial of a hearing to show cause why he should not be reciprocally disbarred.

II. Rule XI Section 18 of the District of Columbia Bar Rules is unconstitutional when it requires the attorney to show cause why he should not be reciprocally disbarred but fails to afford such attorney any hearing.

CONCLUSION 11

Appendix A (Per Curiam Decision, District of Columbia Court of Appeals, July 19, 1985)

Appendix B (Order Upon Petition for Rehearing, October 8, 1985)

Appendix C (Rule XI Section 18(5) of the Rules Governing the Bar of the District of Columbia)

TABLE OF CITATIONS

Cases:	Page
Attorney Grievance Commission v. James, 300 Md. 297, 477 A.2d 1165 (1984)	9
Bradley v. Fisher, 13 Wall 335, 20 L.ed. 646 (1672)	5
In Re: Ruffalo, 390 U.S. 544, 20 L.ed 2d 117, 88 S.Ct. 1222 (1968)	10
Selling v. Radford, 243 U.S. 46,	10
61 L.ed 585, 37 S.Ct. 377 (1917) .	11
Theard v. United States, 354 U.S. 278, 1 L.ed 2nd 1342, 77 S.Ct. 1274 (1957)	10
Constitutional Provisions, Statutes, Ordinances, Rules and Regulations	2
5th Amendment, Federal Constitution	2
14th Amendment, Federal Constitution	2
District of Columbia Rule XI § 18(5),	2
§ 18(5), (6)	6
Federal Rules of Appelate Procedure 46 (b)	9
Maryland Rule BV 10 e 2	9

IN THE

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ROBERT CARROLL MORRIS, IV,
Petitioner,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY
FOR THE DISTRICT OF COLUMBIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

PRELIMINARY STATEMENT

Petitioner, Robert Carroll Morris, IV, prays that a Writ of Certiorari issue to review a judgment of the District of Columbia Court of Appeals, entered on July 19, 1985, petition for rehearing decided October 8, 1985, in the case styled In Re: Robert Carroll

Morris, IV, A Member of the Bar of the District Court of Appeals, which denied petitioner an evidentiary hearing in a reciprccal disbarment proceeding in the District of Columbia.

OPINIONS

The decision of the District of Columbia Court of Appeals dated July 19, 1985 is included herein as Appendix A. The denial of the Order Upon Petition for Rehearing dated October 8, 1985 is included herein as Appendix B.

JURISDICTION

The jurisdiction of this Honorable Court to issue a Writ of Certiorari is based upon 28 USC 1254.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

5th Amendment, Federal Constitution.

14th Amendment, Federal Constitution.

District of Columbia Code, Rules Governing the Bar of the District of Columbia, Rule XI Section 18(5).

STATEMENT OF THE CASE

On January 11, 1984, Petitioner was disbarred by the Court of Appeals of Maryland. On February 28, 1984, the Board of Professional Responsibility for the District of Columbia Court of Appeals ("Board") notified the petitioner to file any objection to reciprocal disbarment by the District of Columbia Court of Appeals within 10 days of February 28, 1984. On March 7, 1984, petitioner filed with the Board his objection to reciprocal disbarment and requested the Board to grant a hearing de novo to allow him to present his reasons why reciprocal disbarment should not be imposed. On June 29, 1984, without granting a

hearing, the Board recommended to the District of Columbia Court of Appeals that reciprocal disbarment be imposed. The District of Columbia Court of Appeals allowed oral argument before it and in its July 19, 1985 opinion, reciprocally disbarred petitioner, which decision was reaffirmed on October 8, 1985 when the Court ruled upon petitioner's petition for rehearing.

STATEMENT OF FACTS

Petitioner sought a full and fair evidentiary hearing before the District of Columbia Board of Professional Responsibility to show cause why he should not be reciprocally disbarred in the District of Columbia. He had sought to demonstrate his meritorious defense in the District of Columbia that his actions in Maryland, for which Maryland disbarred him, did not amount

to misappropriation of client funds, but instead amounted to a fee dispute between he and his client. Petitioner included with his brief filed in the District of Columbia Court of Appeals, a deposit slip evidencing the deposit of his client's funds into his attorney escrow account, a fact the Maryland Court found had not occurred; he included his fee agreement with his client, which fee agreement had never been judicially construed by the Maryland Court, and which the District of Columbia Court of Appeals refused to consider, or construe under the applicable code of conduct standard for the District of Columbia attorneys.

The District of Columbia Court of Appeals in its July 19, 1985 opinion conceded that the District of Columbia

does not automatically disbar lawyers for commingling funds without an intent to misappropriate and went on to state:

> ". . . Where bank records establish unequivocably that a client's funds that should be deposited in an escrow account are not in such an account and where the attorney then fails to provide full and adequate explanation, such evidence constitutes adequate proof of intentional misappropriation sufficient to justify disbarment in the District of Columbia."

(See Appendix A, page 18)

By its action in denying petitioner a full and fair hearing before the Board of Professional Responsibility, petitioner had no opportunity to provide

the District of Columbia the explanation required under its substantive law or to meet his burden required under Rule XI Section 18(5) of the Rules Governing the Bar of the District of Columbia. Petitioner in the Maryland disbarment proceeding had elected to proceed pro se; had relied upon his Fifth Amendment Privilege Against Self Incrimination in limiting his defense in Maryland; had failed to file exceptions to the trial court's findings of facts in Maryland to contest its erroneous findings; and sought review of the Maryland decision by certiorari to this Court, which petition was denied May 14, 1984. (See No. 83-1644 Robert Carroll Morris, IV, Petitioner v. Attorney Grievance Commission of Maryland) (See also 80 Led2d 824).

At no time was petitioner afforded an evidentiary hearing in the District of Columbia.

ARGUMENT

I.

PETITIONER WAS DENIED DUE PROCESS BY THE REFUSAL OF THE DISTRICT OF COLUMBIA BOARD OF PROFESSIONAL RESPONSIBILITY AND DISTRICT OF COLUMBIA COURT OF APPEALS TO AFFORD PETITIONER AN EVIDENTIARY HEARING TO SHOW CAUSE WHY HE SHOULD NOT BE RECIPROCALLY DISBARRED IN THE DISTRICT OF COLUMBIA.

This Court in 1872 recognized the principle presented by this petition. In Bradley v. Fisher, 13 Wall 335, 20 L.ed. 646 (1872) the power of removal of attorneys from the Bar was said to be a power only to be exercised "for the most weighty reasons"; that

"the power of the court should never be exercised without notice to the offending party of the grounds of the complaint against him and affording him ample opportunity of explanation and defense." Id. at 355.

Petitioner contends he has not been afforded his ample opportunity of explanation and defense under the facts and law applicable to the District of Columbia proceeding.

District of Columbia Rule XI, § 18(5) and (6) provides:

"(5) Discipline to be imposed. Upon the expiration of thirty (30) days from service of the notice issued pursuant to the provisions of paragraph (3) above, this Court shall impose

the identical discipline unless Bar Counsel or the attorney demonstrates, or the Court finds upon the face of the record upon which the discipline is predicated, that clearly:

(a) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duty, accept as final the conclusion on that subject; or

(c) The imposition of the same discipline by the Court would result in grave injustice; or

(d) The misconduct established warrants substantially different discipline in this jurisdiction; or

(e) The misconduct elsewhere does not constitute misconduct in the District of Columbia.

If this Court determines that any of those elements exists, the Court shall enter such orders as it deems appropriate, including referral of the matter to the Board for its further consideration and recommendation.

(6) Conclusiveness of adjudication in other jurisdiction. In all other respects, a final adjudication in another jurisdiction or by another court in this jurisdiction that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this Court."

Had petitioner been given an evidentiary hearing de novo, he could

have shown that he did not misappropriate his client's funds. Petitioner could have presented conclusive evidence that his client's check was placed in an escrow account. Petitioner did have an opportunity to be heard on this issue in the original proceeding in Maryland, but did not utilize that opportunity because he wanted to preserve his right against self-incrimination. Thus, petitioner cannot argue that he should not have been reciprocally disbarred because he did not receive proper notice and opportunity to be heard, as subdivision (5)(a) above requires. However, petitioner could have satisfied every other subdivision of the above rule. The proof of his misconduct had to necessarily be infirm in Maryland if petitioner could conclusively prove the contrary before

the District of Columbia Board (see subdivision (5)(b) above). Since petitioner would not have been disbarred in Maryland but for his withholding of such proof of his own innocence, the imposition of reciprocal disbarment in the District of Columbia would result in grave injustice (see subdivision (5)(c) above). Had he been afforded an evidentiary hearing, substantially different discipline was warranted in the District of Columbia (see subdivision (5)(d) above). With a hearing, he could have demonstrated that there was no misappropriation of client funds in Maryland, or at the least, there was commingling but no intent to misappropriate client's funds. Thus, petitioner's actions would not constitute misconduct warranting disbarment in the District

of Columbia (see subdivision (5)(e) above). The rule states that if any of those elements existed, the Court shall enter an appropriate order. Nearly every element was present in petitioner's case, but without an opportunity to present the conclusive evidence of his innocence in a de novo hearing, petitioner could not satisfy any of those elements with only the record in Maryland to support him.

Since petitioner was not allowed to present the evidence that would have exculpated him of any wrongdoing, he was not afforded a full and fair opportunity to be heard in the District of Columbia. The District of Columbia proceeding concerned petitioner's privilege to practice law in the District of Columbia, which is a different

interest than his privilege to practice law in Maryland. Thus, petitioner should have been afforded a full and fair hearing in the District of Columbia, where he would have had an opportunity to present the merits of his case rather than rely upon the flawed presentation that he made in Maryland. Anything less than that constitutes a deprivation of procedural due process.

Maryland allows attorneys facing reciprocal discipline in that jurisdiction to present additional evidence as to why reciprocal discipline should not be imposed by Maryland. Maryland Rule BV10 (e) 2 (1985 Repl.Vol.); Attorney Grievance Commission v. James, 300 Md. 297, 477 A.2d 1185 (1984).

The Federal Circuit Court of Appeals allow attorneys to request a hearing to show cause why they should not be reciprocally disciplined by the Circuit Courts. Rule 46 (b) Federal Rules of Appellate Procedure (1985).

The District of Columbia rule does not provide for a hearing or opportunity to present new evidence by the attorney facing reciprocal discipline, even though the attorney is subject to a new and different deprivation, namely, the loss of his privilege to practice law in the District of Columbia. This Court has stated many times that an attorney must be given notice and opportunity to be heard before being disbarred, or else due process is not satisfied. See, e.g., Selling v. Radford, 243 U.S. 46, 61 L.ed 585,

37 S.Ct. 377 (1917); In Re: Ruffalo, 390 U.S. 544, 20 L.ed 117, 88 S.Ct. 1222 (1968).

The fundemental obligation of the District of Columbia Court of Appeals was to determine for itself the facts of the petitioner's conduct and whether that conduct had been so grievous as to require disbarment. Theard v. United States, 354 U.S. 278, 1 L.ed 2d 1342, 77 S.Ct. 1274 (1957).

Unlike the attorney in In Re: Ruffalo, 390 U.S. 544, 20 L.ed 117, 88 S.Ct. 1222 (1968), the petitioner took issue with the determinations of fact made by the Maryland Court of Appeals when the District of Columbia reciprocal disciplinary proceeding commenced.

Petitioner asserts that it is time for this court to hold that attorneys in reciprocal discipline cases are entitled to a full evidentiary hearing in which to demonstrate their defense why reciprocal discipline should not be imposed.

II.

RULE XI SECTION 18(5) OF THE RULES GOVERNING THE BAR OF THE DISTRICT OF COLUMBIA IS UNCONSTITUTIONAL WHEN IT REQUIRES THE ATTORNEY TO SHOW CAUSE WHY HE SHOULD NOT BE RECIPROCALLY DISBARRED BUT DOES NOT PROVIDE FOR A MANDATORY EVIDENTIARY HEARING IN WHICH TO MAKE SUCH SHOWING.

Rule XI Section 18(5) of the Rules Governing the Bar of the District of Columbia is patterned after the

principles enunciated in Selling v. Radford, 243 U.S. 46, 61 L.Ed 585, 37 S.Ct. 377 (1917).

Absent from such principles is the fundamental requirement of due process under the 5th and 14th Amendments to The United States Constitution, namely the opportunity to defend in a full and fair hearing. When such a statute places upon the attorney the burden of showing cause why the attorney should not be disbarred, the failure to provide a mandatory evidentiary hearing is an absolute denial of due process.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted and the judgment in this case reviewed.

Respectfully submitted,

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APPENDICES

APPENDIX A

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED JUL 19 1985

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 84-97

IN RE: ROBERT CARROLL MORRIS IV,

A Member of the Bar of the
District of Columbia Court of Appeals

(Argued March 25, 1985 Decided July 19, 1985)

BEFORE FERREN, TERRY, and ROGERS, *Associate Judges.*

ORDER

PER CURIAM: This is a reciprocal disciplinary matter before the court for consideration of the Report and Recommendation of the Board on Professional Responsibility (the Board). The Board asserts that respondent, who was disbarred on January 11, 1984, by the Maryland Court of Appeals for violation of certain provisions of the Maryland Code of Professional Responsibility,[1] violated the corresponding provisions of the District of Columbia Code of Professional Responsibility[2] and, ac-

[1] Respondent was found to have violated Maryland Code of Professional Responsibility Disciplinary Rules 1-102(A)(1), (3)-(6); 5-101(A); 6-101(A)(2), (3); 7-101(A)(1)-(3); and 9-102(A)(B).

[2] The District of Columbia Code of Professional Responsibility does not include DR 1-102(A)(6), and DR 9-102(A), (B) has been redesignated as DR 9-103(A), (B).

cordingly, recommends that reciprocal disbarment be imposed. The Report and Recommendation of the Board was based upon evidence adduced in the Maryland proceedings. Under D.C. Bar R. XI, Section (7)(3), we must defer to the Board's findings of fact unless such findings are unsupported by substantial evidence of record, and to "the recommended disposition of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted."

The Board found that Respondent had violated the Disciplinary Rules by his conduct in handling two cases. The Board found that in one case he had misappropriated the funds of a client. Respondent had recovered a money judgment for his client, but he and his client could not agree on how to divide the money. Although the client did not endorse the check, her purported signature appeared on the check cleared by the bank on which it was drawn. Thereafter, Respondent wrote his client that he had deposited the check in an escrow account, although he had not done so. In a second case, Respondent's action in representing a client as personal representative of an estate resulted in a loss of funds. He urged the client to reject an offer to purchase the decedent's house because Respondent and his father would purchase the house, which they did not. Respondent also failed to file the required reports on the estate. Upon being discharged by his client, respondent presented a bill for services rendered which included a number of false statements, and subsequently misrepresented to the Maryland court the nature of a payment from his client. We are satisfied that the record supports the Board's findings of fact and

that respondent violated Disciplinary Rules 1-102(A), 5-101(A), 6-101(A), 7-101(A), and 9-103(A) and (B).[3]

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[3] DR 1-102 provides in pertinent part:

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

* * *

(3) Engage in illegal conduct involving moral turpitude that adversely reflects on his fitness to practice law.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

DR 5-101 (A) provides:

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 6-101 (A) provides in pertinent part:

(A) A lawyer shall not:

* * *

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

DR 7-101 (A) provides in pertinent part:

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B)....

(2) Fail to carry out a contract of employment entered into with a client for professional services,

Substantively, respondent makes the same arguments here which he made to the Maryland Court of Appeals,

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but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

DR 9-103 provides:

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safe-keeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in possession of the lawyer which the client is entitled to receive.

but he has framed them differently. He contends that: (1) the proof in the Maryland proceedings was so infirm that this court cannot accept as final the Maryland court's conclusion; (2) the established misconduct warrants a substantially different kind of discipline; (3) disbarment by the District of Columbia would result in a grave injustice; and (4) the established misconduct in Maryland does not constitute misconduct in the District of Columbia. In its report, which is incorporated in part by reference (See Appendix), the Board evaluated these contentions and found them to be without merit. We agree with the Board's analysis and conclusions and accept them without further analysis or elaboration, except with respect to the Fifth Amendment issue, which we discuss briefly in view of Respondent's brief in this Court.[4] Respondent argues that the Maryland court judge erroneously compelled him to testify, and that because he asserted the Fifth Amendment, he made an imprudent decision which resulted in certain favorable proof never coming to the Maryland court's attention.

The Fifth Amendment of the U.S. Constitution, U.S. CONST. AMEND. V, prohibits a court from compelling a party to testify against himself in a criminal case. The protection extends not only to criminal prosecutions, but to "any other proceedings, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). It is, of course, settled that the privilege against self-incrimination extends to lawyers,

[4] The Board rejected Respondent's Fifth Amendment argument because it found that the evidence in the Maryland disciplinary proceedings was sufficient to warrant disbarment without regard to Respondent's disputed testimony, but it also rejected Respondent's Fifth Amendment argument on the merits.

Spevack v. Klein, 385 U.S. 511, 516 (1967), and a respondent involved in disciplinary proceedings may assert the Fifth Amendment. The protection against self-incrimination, however, "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). A party is not protected from testifying merely because he believes that in so doing, he would incriminate himself; it is for the court to determine whether a potential answer is incriminatory. *Id.* Here, respondent had no "reasonable cause to apprehend danger from a direct answer," *id.*, for the disciplinary proceedings are "of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. 544, 551 (1968); *see In re Thorup*, 461 A.2d 1018, 1019 (D.C. 1983).

Even though we hold that respondent had no reasonable basis for asserting the Fifth Amendment, we address his claim because he has asserted in his brief in this court that because of his exercise of the Fifth Amendment privilege in the Maryland disciplinary proceedings, his defense was never presented. Briefly stated, his defense is: that he had deposited his client's settlement check in his escrow account, that a Maryland Court had held that $3000.00 of the $4000.00 settlement money represented expert witness fees, that he had a retainer agreement entitling him to a one-third contingency fee and requiring the client to pay court costs, and that the contingency fee and court costs exceeded the amount remaining after the expert fees. We find no merit to respondent's argument that this defense was never presented in the Maryland proceeding. As he concedes, he asserted his Fifth Amendment privilege, but the Maryland trial judge compelled him to testify. Respondent had the opportunity to present any defense he chose or

had available, and a review of the transcript of the Maryland proceedings reveals that respondent's defense was heard. That his testimony was conflicting and convoluted is no reason to cocnlude that no defense was presented. Because we concur with the Board's conclusion and recommendation, we do not elaborate on the evidence.

In recommending disbarment, the Board agreed, as do we, with the Maryland Court of Appeals "that 'under the sum total of the circumstances' of Respondent's conduct in [the two cases], 'disbarment is the proper sanction to be imposed.' "

Accordingly, it is ORDERED by the Court that respondent, Robert Carroll Morris IV, is disbarred from the practice of law in the District of Columbia. This order shall take effect 30 days from the date of this opinion.

Appendix: Parts I, II, III and V of the Report and Recommendation of the D.C. Board on Professional Responsibility, dated June 29, 1984.

DISTRICT OF COLUMBIA COURT OF APPEALS BOARD ON PROFESSIONAL RESPONSIBILITY

Bar Docket Number: 115-84

IN THE MATTER OF ROBERT CARROLL MORRIS IV

REPORT AND RECOMMENDATION

Respondent is an attorney admitted to the bar both in Maryland and the District of Columbia. Respondent has now been disbarred in Maryland, and the District of Columbia Court of Appeals has directed the Board on Professional Responsibility to recommend whether reciprocal discipline should be imposed or whether the matter should be heard *de novo* in this jurisdiction. The Board recommends reciprocal discipline.

I. *PRELIMINARY STATEMENT*

At the evidentiary hearing in a disciplinary proceeding before a Circuit Court judge in Maryland, Respondent elected to proceed *pro se*, although he had the right to be represented by counsel. After hearing the evidence, the trial judge issued a report finding that Respondent had violated numerous disciplinary rules.

In an appeal before the Court of Appeals of Maryland, Respondent was represented by counsel but made no exceptions to the trial judge's report. Instead, Respondent pleaded for leniency on the ground that his wrongdoing was not intentional.

The Maryland Court of Appeals "meticulously examined the record," found "clear and convincing evidence to

support the findings of fact of the trial judge," and concluded that those "findings warrant his conclusions of law." The Court of Appeals of Maryland then determined that there were "no extenuating circumstances" and that "disbarment is the proper sanction."

Respondent then filed a Motion for Reconsideration, which the Court of Appeals of Maryland summarily denied without hearing.

In the proceedings before this Board, Respondent has filed an "objection" to reciprocal discipline and has attached thereto both the "Motion for Reconsideration" and "Memorandum in Support of Motion for Reconsideration" previously filed with the Court of Appeals of Maryland. Thus, Respondent is here making the same arguments as were presented to the Maryland Court of Appeals in a Motion for Reconsideration. Stripped of all surplusage and repetitiveness, these arguments boil down to two main contentions, *i.e.*,

—that misappropriation of a client's funds does not warrant disbarment when no intent to steal or defraud is found; and

—that the trial judge improperly overruled Respondent's objections based on his Fifth Amendment privilege against self-incrimination.

This Board has carefully considered both of Respondent's objections under the criteria for reciprocal discipline as set forth in Rule XI, Sec. 18(5) of the D.C. Court of Appeals, which provides in pertinent part that reciprocal discipline will be imposed unless:

(a) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duty, accept as final the conclusion of that subject; or

(c) The imposition of the same discipline by the Court would result in grave injustice; or

(d) The misconduct established warrants substantially different discipline in this jurisdiction; or

(e) The misconduct elsewhere does not constitute misconduct in the District of Columbia.

Respondent's objections to reciprocal discipline are not persuasive under any of the above criteria.

II. *RESPONDENT'S MISCONDUCT AS ESTABLISHED BY THE EVIDENCE IN THE MARYLAND PROCEEDINGS*

The charges against Respondent were based on his conduct in handling two cases. One of these was *Martin* v. *Lockwood*, in which Respondent was found to have misappropriated the funds of a client, and the second matter involved the estate of William M. Poynton.

A. *The Record in the Maryland Proceedings Relating to Misappropriation in Martin v. Lockwood*

The charges against Respondent relating to misappropriation occurred in the course of his conduct in *Martin* v. *Lockwood*.

Respondent, as the attorney for Ms. Martin, had recovered a $4,000 judgment on her behalf and thereafter

received a check for that amount payable to himself and Ms. Martin. The check was dated August 14, 1981.

In preparing for trial of Ms. Martin's case, Respondent hired a Mr. Hellman as an expert to assist in the preparation and to testify at the trial. Mr. Hellman later presented a bill of over $3,000 for his services, and Respondent claimed he (Respondent) was entitled to a contingent fee of $1,333, or one-third of the total recovery. Payment of these two claimed amounts would have left no money at all for Ms. Martin.

At a post-trial meeting Ms. Martin and Respondent were unable to agree on how the amount recovered should be divided, and Ms. Martin did not sign the $4,000 check. However, the check, with her purported signature thereon, cleared the bank on which it was drawn on September 18, 1981. In August or September 1981, Respondent wrote Ms. Martin that he had placed the funds in escrow, when in fact he had not done so.

An interrogatory in the disciplinary investigation asked Respondent to state where the $4,000 was from the time it was received in August 1981 until September 17, 1982, and Respondent answered "People's Security Bank of Maryland" (II Tr. 36). However, the evidence showed that an escrow account in Respondent's name was first opened in the People's Security Bank of Maryland on September 17, 1982, which was thirteen months after Respondent had received the $4,000 and was also the same day as the hearing on the disciplinary charges against Respondent. The check starting the escrow account on September 17, 1982 was not the check Respondent had received in the *Martin* case. Respondent had no other account in the People's Security Bank.

The $4,000 in the escrow account was ultimately distributed to Ms. Martin and Mr. Hellman on April 15,

1983. By that time, Mr. Hellman had obtained a judgment against Respondent and Ms. Martin had brought suit against him.

At the Maryland disciplinary hearing, Bar Counsel called Respondent to the stand. At first, Respondent objected and refused to testify on the ground that he had a constitutional right not to testify as part of the case in chief against him. The objection was overruled. (II Tr. 23). Thereafter, in response to numerous specific questions of Bar Counsel, Respondent testified at length concerning his handling of the $4,000 recovery in the *Martin* case. He said that after he received the $4,000 check, he signed his name on the check and gave it to his father who took care of his business affairs (II Tr. 26, 33, 35). Respondent said he did not know who signed Ms. Martin's name to the check. He explained that he had no bank statements with respect to the $4,000 for the period from August 14, 1981 to September 17, 1982. (II Tr. 34). Respondent said he had discussed with his father the theory that Mr. Hellman's charges were "costs" and that no money was due to Ms. Martin because these "costs" plus his own contingent fee aggregated more than the $4,000 recovery. He also discussed a presumed "right" to deal with "costs" in any manner he saw fit. (Tr. 33, 35).

Respondent further testified in the Maryland disciplinary hearing that he did not write the check by which the escrow account was opened on September 17, 1982 and that he did not personally open the account. (II Tr. 40-41). Respondent was asked whether it had been opened on Septem er 17, 1982 at his direction, and he answered "No, I di. *n*'t discover it until later that it wasn't escrowed all along." (II Tr. 41) Then, he was asked "Until later than what?", whereupon Respondent

refused to answer this specific question based on a claimed constitutional right against self-incrimination. The Maryland judge overruled Respondent's objection, stating that the privilege against self-incrimination is not available in a grievance proceeding. Respondent then testified that he learned after September 17, 1982, that the money had not been previously escrowed (Tr. 40 42). Respondent's subsequent testimony with respect to the *Martin* case related to the final disposition of the $4,000 in 1983 (II Tr. 46 49).

The trial judge found that for the period between August 14, 1981 (the date on which he received the $4,000 check) and September 17, 1982 (the date the escrow account was opened), Respondent had misappropriated and converted the $4,000 to his own use.

B. *The Record in the Maryland Proceedings Relating to Respondents' Misconduct In The Poynton Estate Matter*

In February 1981, Wilma Briggles hired Respondent and paid him a retainer of $500 to represent her as the Personal Representative and/or to represent the estate of Wilbur M. Poynton who had died in January 1981. Respondent had previously prepared Poynton's will, which divided the decedent's property equally between two surviving children, one of whom was Wilma Briggles.

Respondent assisted in arranging for a listing contract between Wilma Briggles and a real estate firm, and in March 1981 this listing resulted in an offer of $29,100 to buy the decedent's house, which was the only major asset of the estate. However, Respondent urged Wilma Briggles not to accept this offer. The reason given was that either Respondent, or his father, would purchase the house. No such purchase was forthcoming, and in No-

vember 1981 the house was sold for only $24,000, of which $14,900 was paid by means of an interest-free five-year note.

In the meantime, Respondent did not file anything in the estate matter until November 4, 1981. At that time, he filed an Inventory along with a notice of his appearance. Previously, on May 13, 1981, the Register of Wills had sent Wilma Briggles a notice that two reports for the estate were overdue, and she proceeded to file one of these reports in June 1981 without any assistance from Respondent. Briggles had previously filed numerous other papers in the estate proceeding.

Later, in December 1981, Wilma Briggles discharged Respondent as her attorney, whereupon Respondent submitted his statement for services rendered in the amount of $1,845. This statement include numerous false statements, to wit:

—that Respondent had obtained an Order admitting the will to probate;

—that Respondent had obtained testimony of subscribing witnesses, a certificate of proof of will and letters testamentary; and

—that Respondent had handled the publication of notice to creditors and prepared a tax report.

Respondent's statement also included two items asserted to represent amounts due to Respondent from Max Poynton (the other surviving child of the decedent) on two loans of $100 each, plus a $500 charge for services allegedly rendered to the son of Wilma Briggles. None of these items pertained to the estate.

In April 1982, during a hearing on Respondent's petition for counsel fees in the estate matter, Respondent

misrepresented to the Court that the $500 payment from Wilma Briggles was not for handling the estate. In fact, she had paid Respondent a separate amount, also of $500, to handle her non-estate matter, as well as $500 for the estate proceeding.

In the Maryland disciplinary proceedings, Respondent's conduct in the Poynton estate matter was found to violate numerous disciplinary rules, *e.g.*, DR 1-102(A)(1), (5) and (6); DR 2-106; DR 2-110(B)(4); DR 5-101 (A); DR 7-101(A)(2) and (3); and DR 7-106(C)(6) and (7). Without unduly extending this Report by an analysis of each of these violations found in the Maryland proceedings, this Board is satisfied that the factual findings of the Maryland court, which Respondent does not dispute, support the conclusion that Respondent violated each of the above disciplinary rules one or more times.

III. *RESPONDENT'S OBJECTION TO THE ADEQUACY OF THE RECORD ON MISAPPROPRIATION*

In his objections to reciprocal discipline, Respondent argues that the record in the Maryland proceedings contained "insufficient proof" of any violation sufficient to warrant disbarment, because "there has never been a finding of fact that he misappropriated his client's funds for personal gain." This same contention was made in Respondent's Motion for Reconsideration before the Court of Appeals of Maryland:

> "The mishandling of client funds does not warrant disbarment when no intent to steal or defraud is found."

Memorandum in Support of Motion for Reconsideration, at p. 3.

In terms of Rule XI criteria, Respondent contends that the balance of an affirmative finding of intentional dis-

honesty or fraud should "give rise to the clear conviction" that this jurisdiction "could not, consistent with its duty, accept as final the conclusion [of the Maryland Court of Appeals] on that subject," and that reciprocal disbarment in the District of Columbia "would result in grave injustice." This contention is totally lacking in merit.

The basic premise underneath Respondent's contention is that the Maryland Court of Appeals, in ordering disbarment, grossly misapplied the state's disciplinary rules.

Respondent's contention borders on the frivolous. It was only two years ago that the Court of Appeals of Maryland undertook "once again . . . to make indelibly clear that, ordinarily, the sanction for misappropriation of a client's funds by an attorney is disbarment." *Atty. Grievance Comm'n* v. *Boehm*, 446 A.2d 52 (Md. 1982). In that proceeding, the accused attorney (Boehm) argued on appeal that disbarment was not justified inasmuch as "the trial judge did not conclude that Boehm [had engaged in] . . . conduct involving dishonesty, fraud, or deceit". The Court of Appeals of Maryland found "it unnecessary to decide that issue" because bank statements established that the balance in the attorney's escrow account, into which the proceeds of a sale of property in an estate had been deposited, fell far below the amount due to the estate. Although the "trial judge concluded that Boehm had merely been negligent in handling the estate funds by relying on his bookkeeper to keep his accounts in order," disbarment was nonetheless the appropriate sanction because "Boehm's contention that his inexperience and poor accounting practices constitute extenuating circumstances is without merit . . . ." *Id.* at 53-54.[1]

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[1] *See also, Atty. Grievance Com'n of Md.* v. *Pattison*, 441 A.2d 328, 331 (Md. 1982), where the Court of Appeals of

This Board concludes that the record in the Maryland proceedings contained clear and convincing evidence that was plainly adequate under the disciplinary rules of Maryland to support the decision of the Court of Appeals finding misappropriation and ordering Respondent's disbarment. The record established unequivocally, even without Respondent's testimony, that for more than a year after receiving the recovery in the *Martin* case, Respondent failed to keep the funds in escrow as he was ethically obligated to do and otherwise failed to account for the client's funds. Contrary to Respondent's contention, the State of Maryland was not required to prove what happened to the money during the period prior to the date that it was first placed in any escrow account.

The District of Columbia also regards any misappropriation or commingling of client's funds with other funds as a breach of the disciplinary rules, regardless of intent. In *In the Matter of E. David Harrison*, 461 A.2d 1034 (D.C. 1983) misappropriation by an attorney was defined as "the unauthorized use of clients' funds entrusted to him, including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." The Court then said: "This definition makes clear that improper intent is not an element to be con-

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Maryland held that an attorney had misappropriated a client's funds in violation of DR 9-102(A) by making loans of those funds to himself, even though the trial judge found no "intent to steal the monies" and "no intent whatever to deprive the owner permanently of the money involved." In concluding that misappropriation warrants disbarment, despite the absence of any intent to steal, the Maryland Court of Appeals announced in no uncertain terms: "We desire that the message go out loud and clear to the Maryland Bar and to the citizens of Maryland that we shall not tolerate attorneys' misusing of their clients' funds." *Id.* at 333.

sidered in determining whether there has been a misappropriation."

While the District of Columbia does not automatically impose disbarment as the sanction for commingling without intent to misappropriate (as the *Harrison* case shows), the normal remedy for commingling and misappropriation of funds is disbarment. *In re McClellan*, M-51-80 (D.C. 1981); *In re Burka*, 423 A.2d 181 (D.C. 1980); *In re Newsome*, D-34-79 (D.C. 1979). Moreover, where bank records establish unequivocally that a client's funds that should be deposited in an escrow account are not in such an account and where the attorney then fails to provide full and adequate explanation, such evidence constitutes adequate proof of intentional misappropriation sufficient to justify disbarment in the District of Columbia. *Compare In re Burton*, Nos. M-143-82; 83-492 (D.C. January 11, 1984).

Accordingly, Respondent's contention that the record in the Maryland proceeding did not justify disbarment under Maryland's interpretation of the disciplinary rules is wholly without merit. Similarly, Respondent's further contention that a substantially different discipline would be warranted under the disciplinary rules as administered in this jurisdiction is likewise rejected.

* * * *

V. *CONCLUSION AND RECOMMENDATION*

Although Respondent's conduct in the *Martin* case would alone be sufficient to justify reciprocal disbarment in this jurisdiction, the Board concurs with the Maryland Court of Appeals that "under the sum total of the circumstances" of Respondent's conduct in both the Martin case and the Poynton estate matter, "disbarment is the proper sanction to be imposed."

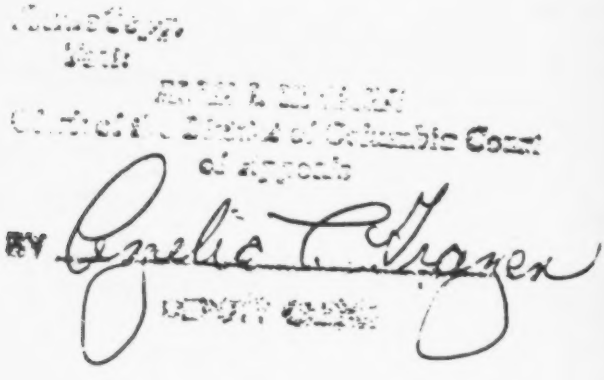
For the foregoing reasons, the Board recommends that the District of Columbia Court of Appeals impose reciprocal disbarment in this jurisdiction.

The Board on Professional Responsibility

By: /s/ J. Randolph Wilson
J. RANDOLPH WILSON

All Members of the Board concur in this recommendation.

Dated: June 29, 1984.



APPENDIX B

FILED OCT - 8 1985

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 84-97

IN RE: ROBERT CARROLL MORRIS IV,

A Member of the Bar of the
District of Columbia Court of Appeals.

On Petition for Rehearing

Filed October 8, 1985

Before FERREN, TERRY, and ROGERS, *Associate Judges.*

ORDER

On consideration of the petition for rehearing, it is

ORDERED that the petition is granted only to the extent that the first full paragraph on page 5 [1479] of the opinion herein filed July 19, 1985, beginning "The Fifth Amendment . . ." is deleted in its entirety and the following is substituted for the first full paragraph on page 6 [1480], beginning "Even though we hold . . .":

> We address this claim because respondent has asserted in his brief in this court that because of his exercise of the Fifth Amendment privilege in the Maryland disciplinary proceedings, his defense was never presented. That defense, briefly stated, is: that he had deposited his client's settlement check in his escrow account, that a Maryland court had held that $3000.00 of the

$4000.00 settlement money represented expert witness fees, that he had a retainer agreement entitling him to a one-third contingency fee and requiring the client to pay court costs, and the contingency fee and court costs exceeded the amount remaining after the expert fees. As respondent concedes, he asserted his Fifth Amendment privilege but the Maryland trial judge compelled him to testify. He thus had the opportunity to present any defense he chose or had available, and a review of the transcript of the Maryland proceedings reveals that respondent's defense was heard. That his testimony was conflicting and convoluted is no reason to conclude that no defense was presented. Because we concur with the Board's conclusion and recommendation, we do not elaborate on the evidence.

PER CURIAM.

BY Lydia C. Grayson
DEPUTY CLERK

BEST AVAI

APPENDIX C

Section 18. *Reciprocal discipline.*

(1) Bar Counsel's duty to obtain order of discipline from other disciplining court. All attorneys subject to the provisions of this Rule shall, upon being subjected to professional disciplinary action in another jurisdiction or by another court in this jurisdiction, promptly inform Bar Counsel of such action. Upon being informed that an attorney subject to the provisions of these Rules has thus been subjected to discipline, Bar Counsel shall obtain a certified copy of the disciplinary order and file it with the Board and with the Clerk of this Court.

(2) Notice served upon the Board. Upon receipt of a certified copy of an order demonstrating that an attorney admitted to practice in the District of Columbia has been disciplined in another jurisdiction or by another court in this jurisdiction, the Court shall forthwith issue a notice directed to the Board, with a copy thereof to the attorney, including a copy of the order from the other court and requesting the Board to recommend to the Court, within 30 days, whether reciprocal discipline should be imposed or whether the Board, instead, elects to proceed de novo pursuant to § 7 of this Rule.

(3) Notice served upon respondent. If the Board recommends to the Court that reciprocal discipline be imposed, the Court shall forthwith issue an order directing that the attorney inform the Court, within 30 days from service of the notice, of any claim by the attorney, predicated upon the grounds set forth in paragraph (5) of this section, that the imposition of the identical discipline in the District of Columbia would be unwarranted and the reasons therefor.

(4) Effect of stay of discipline by other court. In the event the discipline imposed in the other jurisdiction or by the other court in this jurisdiction has been stayed therein, any reciprocal discipline imposed in the District of Columbia shall be deferred until the stay expires.

(5) Discipline to be imposed. Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of paragraph (3) above, this Court shall impose the identical discipline unless Bar Counsel or the attorney demonstrates, or the Court finds upon the face of the record upon which the discipline is predicated, that clearly:

(a) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duty, accept as final the conclusion on that subject; or

(c) The imposition of the same discipline by the Court would result in grave injustice; or

(d) The misconduct established warrants substantially different discipline in this jurisdiction; or

(e) The misconduct elsewhere does not constitute misconduct in the District of Columbia.

If this Court determines that any of those elements exists, the Court shall enter such order as it deems appropriate, including referral of the matter to the Board for its further consideration and recommendation.

(6) Conclusiveness of adjudication in other jurisdiction. In all other respects, a final adjudication in another jurisdiction or by another court in this jurisdiction that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this Court.

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